No. 14,601

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and COREY GABRIELSON,

Appellees.

REPLY BRIEF FOR APPELLANT.

MALONE & SULLIVAN,
WILLIAM M. MALONE,
RAYMOND L. SULLIVAN,
WILLIAM J. DOWLING, JR.,
1120 Mills Tower, San Francisco 4, California.
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Cases

Miscellaneous

No. 14,601

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and COREY GABRIELSON,

Appellees.

REPLY BRIEF FOR APPELLANT.

The appellees do not question the summary of evidence as set forth in the appellant's opening brief. They do purport to present certain "additional facts" which are, the appellant submits, in some respects immaterial to the controversy and in all other respects strengthening to the appellant's position.

Comment with respect to certain of the "additional facts" will be made in the course of this brief. However with respect to the appellees' recounting of their inquiries about the applicability of the Rent Regulations, appellant submits that the facts substan-

tiate appellant's position. From a time prior to the effective date of the lease, which was January 1, 1952, until May 1952, a period of five months, during which the overcharges occurred, the appellees made no inquiries at all. And this despite the fact that the appellee Gabrielson knew, in February 1952, that Parks Air Force Base in the vicinity of the motel, was being reactivated and there were articles in the papers dealing with the possible restablishment of rent control in that area (Tr. 108, 109).

I.

THE MAXIMUM RENT FOR THE PREMISES WAS FIXED BY SECTION 93 OF RENT REGULATION 1.

Responsive to the above proposition, the appellees first set up a straw man and then try to knock him down. They say that if section 93 is applicable the first rent, and therefore the maximum rent, is zero. Not so. The first rent was the formula: gross receipts less $500.00. The application of this formula produced the payment of no money the first month, because gross receipts were less than $500.00. The application of the same formula produced the payment of $175.00 the second month, because gross receipts were $675.00. There was no dispute between the parties as to this, nor was there any doubt. The appellees did not seek to collect any money for January 1952 because, applying the undisputed and known formula, none was payable (Tr. 73). For the

month of February 1952 there was likewise no dispute or uncertainty and the sum of $175.00 was paid and accepted (Tr. 89, 90). What appellees fail to discuss is that there was a departure from this formula commencing with the month of March, and a new formula, more burdensome on the tenant, and producing a higher rent, was applied in the months of March, April and May, 1952.

The mere fact that the lease provides for the more burdensome formula is no justification for the exaction of the higher rent. Section 71 of the regulations expressly so provides. Such a lease simply permits an application for adjustment under section 130, which application was never made (see Appellant's Opening Brief p. 16).

Appellees mention the purported obligation of the appellant to pay taxes and insurance (Appellees' Brief p. 7). But there was no obligation on the appellant to pay taxes or insurance at any time during his tenancy. Such obligation would not have commenced until October 1, 1952 (Plaintiff's Exhibit No. 1; Tr. 14) and the appellant's tenancy terminated at the end of September.

The matter of "rental payments . . . credited to the purchase price" (Appellees' Brief p. 7) is equally irrelevant. The lease contains an option to purchase (Plaintiff's Exhibit No. 1; Tr. 30). Under section 72 of Rent Regulation 1 any sums demanded or received for such an option in excess of the maximum rent are overcharges, except under very limited circum-

stances not existing in this case. Appellant does not understand that the appellees make any contention that the provisions of section 72 have been complied with and thus does not extend this reply brief with a full discussion of its provisions.

II.

SECTION 166 OF RENT REGULATION 1 DOES NOT ESTABLISH THE LAWFUL MAXIMUM RENT.

Appellees profess to see some inconsistency in the statement that section 166 would have been relevant if the Rent Director had made a timely order pursuant thereto. There is no inconsistency. If an order had been made pursuant to section 166 it would have been valid to fix the rent prospectively from the date of the order. *United States v. McCrillis,* 1st Cir. 1952, 200 F. 2d 884, so indicates. The same case holds, on the very issue then before the court, that in the absence of such an order the maximum rent is fixed by the applicable statute and regulations and it is the province and the duty of the court to ascertain the facts, apply the law and thus determine the maximum rent.

Appellees misconceive the function and purpose of section 166. Rent Regulation 1 is divided into eleven parts. Part 4 is entitled "Maximum Rents". It is under this part that maximum rents are fixed and it is this part which includes section 93. Part 5

is entitled "Adjustments and Other Determinations". Section 166 is in Part 5. It is not a method of fixing the maximum rent; it is a method of determining a fact or facts upon the basis of which the maximum rent is then fixed according to the rules set forth in Part 4 of the regulations. If there was a dispute about the facts, or if they were in doubt, *and* they could not be ascertained, only then could an administrative order have been made fixing rent prospectively upon the basis of comparable rents. In this case the facts are not in dispute. Appellees concede that in their brief. Section 166 has no applicability whatsoever.

The facts being undisputed, as appellees concede, it is impossible for them to argue that the court is unable to ascertain the facts and thus powerless to determine what was at all times the maximum rent by applying the law to those facts.

Rhodes v. Hanschl, U.S.D.C., E.D. Pa., 1950, 94 F. Supp. 1009, cited by appellees is not in point. In that case the maximum rent was fixed by the rent regulation at $22.50 per week. The director made an order reducing that rent, but made it pursuant to proceedings instituted more than three months after registration of the rent by the landlord. Under the regulations such an order could not have retroactive effect. Under the regulations the maximum lawful rent was $22.50 per week subject to the authority of the director to order a reduction. Until the order was made, $22.50 per week was the lawful

maximum and the collection of that amount was not an overcharge.

Nor is *Markbreiter v. Woods,* Em. Ct. of Appeals, 1947, 163 F. 2d 993, in point. In that case the rent director purported to make a retroactive order pursuant to section 166. The Emergency Court of Appeals ruled that the director had no power to do so. It involved no determination of the maximum rent in the absence of a valid order, the nature of the proceedings being such as to require no such determination. The proceeding was one for declaratory relief to adjudge the order invalid. No action for overcharges was involved.

Appellant respectfully directs the court's attention to the discussion of *United States v. McCrillis,* supra, in Appellant's Opening Brief (pp. 22-24). It appears to be compelling and conclusive as to the appellant's contention that it was the province and duty of the trial court to find the facts (which are undisputed) and apply the law so as to determine the maximum rent.

CONCLUSION.

Appellees commence their argument by conceding that the premises were subject to control (Appellees' Brief p. 4). They then devote themselves to the illogically conceived task of trying to prove that the law provides no control over that which the statute and the regulations have at their very heart—the

matter of the lawful maximum rent. Appellant respectfully submits that the premises cannot be controlled and uncontrolled at the same time, as appellees are prone to argue.

Dated, San Francisco, California,
June 3, 1955.

Respectfully submitted,
MALONE & SULLIVAN,
WILLIAM M. MALONE,
RAYMOND L. SULLIVAN,
WILLIAM J. DOWLING, JR.,
Attorneys for Appellant.